Abdullah bin Atan v Public Prosecutor and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(M)-56–02 OF 2019 (J), 05(M)-205–09 OF 2018(W), 05(M)-206–09 OF 2018(W) AND 05(LB)-207–09 OF 2018(W)
TENGKU MAIMUN CHIEF JUSTICE, ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), VERNON ONG, ABDUL RAHMAN SEBLI, HASNAH HASHIM AND MARY LIM FCJJ
26 AUGUST 2020

Evidence — Presumption — Drug trafficking — Trial judge at end of prosecution's case found prima facie case of trafficking made out against accused — Finding based on presumption of drug trafficking invoked against accused under s 37(da) of Dangerous Drugs Act 1952 ('DDA') — Whether statutory presumption was not 'credible evidence' that proved ingredient of trafficking — Whether trial judge erred in holding 'prima facie case' as defined under s 180(4) of Criminal Procedure Code ('CPC') had been made out — Whether s 180(4) which came into force long after s 37(da) could not be construed as negating the latter since the former allowed ingredients of any offence to be proven by direct evidence or by inferences from facts or by invoking presumptions of law — Whether DDA was specific law governing dangerous drugs trials — Whether if credible evidence established that accused had actual possession of drugs and weight of drugs exceeded statutory limit, trial court had to invoke s 37(da) presumption and find prima facie case of trafficking made out under s 180(4) of CPC

The appellants in Appeal Nos 56 ('Abdullah'), 205 ('Reza') and 206 ('Hassan') and the respondent in Appeal No 207 ('Mahmood') were convicted and sentenced to death by the High Court on charges of trafficking in dangerous drugs contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Abdullah was charged with trafficking in 4,213g of cannabis while Reza, Hassan and Mahmood — all Iranians — were jointly charged with trafficking in 15,821g of methamphetamine. On appeal, the Court of Appeal quashed Mahmood's conviction and affirmed the convictions and sentences of the others. In the instant appeals, Abdullah, Reza and Hassan appealed against their conviction and sentence while the Public Prosecutor appealed against Mahmood's acquittal.

Appeal No 56:

The prosecution's case against Abdullah was that following his arrest by a police party, whom he had tried to run away from when approached, on a roadside, he led police to his rented room in a double-storey shop-house where the cannabis was found under a table. Since Abdullah had pointed out where the drugs were kept, the trial judge concluded that he had knowledge and actual possession of the cannabis and invoked the presumption under s 37(da) of the DDA that he

was trafficking in the drug. On those facts, the trial judge ruled that the prosecution had made out a prima facie case and called on Abdullah to make his defence. Abdullah's denial of knowledge of the drugs and his claim that it belonged to a woman who shared his room did not find favour with the trial judge in the absence of evidence to indicate that a woman was also occupying the premises. Abdullah was convicted and sentenced on the trial court finding that he had not rebutted the presumption of trafficking nor that he had raised a reasonable doubt on the prosecution's case.

Appeal Nos 205, 206 and 207:

The police had been monitoring the goings-on at a particular house for several days and pounced into action when a car drove up and its occupant entered the house. The police party barged into the house after breaking down the front door and rushed up to the fourth floor where they saw three men (said to be Reza, Hassan and Mahmood) trying to flee through the roof. The men were caught and arrested and the police party searched the premises and recovered 15,821g of methamphetamine. Various types of drug manufacturing/processing equipment and chemicals were also found in the premises. Finding that the element of possession had been established against the three men, the trial judge invoked the presumption of trafficking against them under s 37(da) and thereafter called for their defence after ruling that a prima facie case had been made out. Mahmood claimed he had nothing to do with the house or the drugs and that he had just arrived at the house to deliver food from a restaurant where he worked when the police arrested him. Reza and Hassan, on the other hand, said they merely followed one Mehdi in his car to the house and had fallen asleep when they were suddenly woken up by the raiding police party. The trial judge found the defences of all the three to be bare denials and convicted them after finding they had not rebutted the presumption of trafficking nor cast any reasonable doubt on the prosecution's case.

In the instant appeals, Abdullah, Reza and Hassan raised a common point of law, ie, that a prima facie case of trafficking could not be made out simply by invoking the presumption of trafficking under s 37(da) of the DDA. They argued that a statutory presumption was not evidence and that s 180(4) of the Criminal Procedure Code ('the CPC') provided that to determine whether a prima facie case had been made out against an accused at the end of the prosecution's case, the prosecution must have 'adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'. The prosecution replied that, inter alia, s 180(4) of the CPC was a law of general application for the purpose of finding whether a prima facie case had been made out, but since the DDA was a specific law to deal with dangerous drugs offences, the presumption under s 37(da) of the DDA was credible evidence to establish a prima facie case of trafficking.

Held, unanimously dismissing the appeals and affirming the decision of the Court of Appeal ('COA'):

(1) By tracing its legislative history, it was apparent that the whole purpose of s 180(4) of the CPC was to clarify Parliament's intention for the threshold to be applied at the close of the prosecution's case. The purpose of s 180(4) was not to exclude the use of presumptions, inferences or anything other than direct evidence, in establishing a prima facie case. Statutory presumptions were often invoked by the prosecution to establish a prima facie case of drug trafficking in previous cases. No concern was raised in Parliament as to the use of presumptions when the amendments to s 180 of the CPC were being considered (see paras 41–42).

(2) By reading s 180(4) of the CPC in the light of its context and legislative purpose, the phrase 'credible evidence proving each ingredient of the offence' meant that the prosecution could prove each ingredient of the offence either: (a) by adducing credible direct evidence of that ingredient; (b) by drawing inferences of fact, ie, adducing credible circumstantial evidence, from which the ingredient could be inferred; or (c) by invoking presumptions of law, ie, adducing credible evidence of relevant basic facts, to invoke a statutory presumption that the ingredient existed. Therefore, in order to rely on the presumption of trafficking in s 37(da) of the DDA, the prosecution had to adduce credible evidence of the basic facts, ie, the nature and amount of the illicit drug in question and the element of possession (see paras 43 & 47).

(3) Section 37(da) of the DDA existed before s 180(4) of the CPC came into force. When s 180(4) was introduced into the CPC, Parliament must have been aware of the existing law and the specific manner and method in which trafficking cases were proven, ie, on a presumption basis upon a finding of the fact of possession. Had Parliament intended the drastic consequence of effectively repealing a long-established statutory provision, it would have said so in clear terms. Furthermore, the DDA specifically dealt with trials in respect of dangerous drugs. The CPC, on the other hand, was a law of general application. A conflict between a specific law and a general one could be resolved either by application of the maxim *generalia specialibus derogant* or by the doctrine of harmonious construction (see paras 52–53).

(4) Section 180(4) of the CPC had to be read harmoniously with s 37(da) of the DDA. Such a construction would limit 'credible evidence' to the actual finding of possession and once that was established successfully, it would invoke the presumption of trafficking. Defence would then be called on trafficking where the legal burden would shift to the accused to disprove trafficking (see para 58).

(5) On a proper construction, to make out a prima facie case under s 180(4) of the CPC, credible evidence was still required for a prima facie finding of actual possession. It was then that the presumption of trafficking

kicked in for the accused to disprove on balance of probabilities that he was not trafficking in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent and would also render the entire presumption regime superfluous, devoid of any utility and effectively amount to a repeal of s 37(da) of the DDA (see para 60).

(6) In the instant appeals, having found that actual or affirmative possession of the impugned drugs by the accused had been established based on credible evidence and that the weight of the drugs in question exceeded the statutory limits, the trial judge was entitled to find that a prima facie case had been made out under s 180(4) of the CPC by invoking the presumption of trafficking under s 37(da) of the DDA (see para 61).

(7) There was no reason to disagree with the COA's affirmation of the trial judge's findings with regard to Reza's and Hassan's defence. Both of them claimed they were drinking with one Mehdi at a club after which they followed Mehdi in his Mercedes Benz car to the house where the drugs were found and thereafter they continued drinking until they fell asleep. The trial judge found this version improbable because, inter alia, Mehdi was not immediately informed to the police, his name was only brought up during the trial, the police team monitoring the house did not see any Mercedes Benz car and there was no person named Mehdi at the house when the police raided it. The COA considered the fact that Reza and Hassan did not explain why they were the only ones at the house and why they fled when the police came. At the time of the arrest, Reza and Hassan were the only ones in control of the premises. Looking at the whole evidence, it was highly improbable that their presence was coincidental. If Mehdi was the culprit and the cause of their predicament, they should have informed the police about Mehdi soon after their arrest and not waited until the trial. The version presented by Reza and Hassan did not raise any reasonable doubt on the prosecution's case. On the evidence, there was no error in the finding that Reza and Hassan had custody, control and knowledge of the drugs and therefore were in actual possession of it. Their convictions were safe (see paras 63–66 & 68–69).

(8) The COA was correct in quashing Mahmood's conviction on finding that the element of possession had not been proven against him. Inter alia, the COA found that there was no evidence to establish that Mahmood had entered the house at any time during the surveillance period; that none of the witnesses testified that Mahmood was seen in the car that came to the house; that Mahmood had been at the house for only eight minutes before he was arrested and that this was insufficient to establish that he had custody and control of the impugned drugs; that no DNA or fingerprint of Mahmood was found on any item in the house; that he was wearing clothes which did not match the description given by SP8 of the persons he saw attempting to flee through the roof of the

house; that unlike Reza and Hassan who sustained injuries when they jumped off the roof, there were no injuries on Mahmood and that Mahmood's statement to the police that he was working at the 1001 Nights Restaurant & Club and had gone to the house to deliver food when he was arrested tallied with his defence at the trial (see paras 70–74).

[Bahasa Malaysia summary

Perayu dalam Rayuan No 56 ('Abdullah'), 205 ('Reza') dan 206 ('Hassan') dan responden dalam Rayuan No 207 ('Mahmood') disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi terhadap pertuduhan pengedaran dadah berbahaya yang bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Abdullah dituduh mengedar 4,213g ganja sementara Reza, Hassan dan Mahmood — kesemuanya warganegara Iran — dituduh bersama dengan mengedarkan 15,821g methamphetamine. Semasa rayuan, Mahkamah Rayuan membatalkan sabitan Mahmood dan mengesahkan sabitan dan hukuman yang lain. Dalam rayuan semasa, Abdullah, Reza dan Hassan mengemukakan rayuan terhadap sabitan dan hukuman mereka sementara pendakwa raya merayu terhadap pembebasan Mahmood.

Rayuan No 56:

Kes pendakwaan terhadap Abdullah adalah berikutan penangkapannya oleh pihak polis, yang mana beliau cuba melarikan diri apabila dihampiri, di tepi jalan, dia membawa polis ke bilik sewanya di sebuah rumah kedai dua tingkat di mana ganja tersebut dijumpai di bawah meja. Oleh kerana Abdullah telah menunjukkan di mana dadah tersebut disimpan, hakim perbicaraan menyimpulkan bahawa beliau memiliki pengetahuan dan pemilikan sebenarnya ganja tersebut dan mengguna pakai anggapan di bawah 37(da) ADB bahawa beliau mengedar dadah tersebut. Berdasarkan fakta tersebut, hakim perbicaraan memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie dan meminta Abdullah untuk membela diri. Penafian Abdullah tentang pengetahuan mengenai dadah dan dakwaan bahawa ianya adalah milik seorang wanita yang berkongsi biliknya tidak mendapat sokongan hakim perbicaraan dengan ketiadaan bukti yang menunjukkan bahawa seorang wanita juga mendiami premis tersebut. Abdullah disabitkan dan dijatuhkan hukuman di mahkamah perbicaraan berdasarkan dapatan bahawa beliau tidak membantah anggapan pengedaran dan juga tidak menimbulkan keraguan yang munasabah terhadap kes pendakwaan.

Rayuan No 205, 206 dan 207:

Pihak polis telah memerhati keluar masuk sebuah rumah selama beberapa hari dan bertindak apabila sebuah kereta datang dan pemandunya memasuki rumah tersebut. Pihak polis menyerbu masuk ke dalam rumah setelah memecah pintu depan dan bergegas ke tingkat empat di mana mereka melihat tiga lelaki (dikatakan Reza, Hassan dan Mahmood) cuba melarikan diri melalui bumbung. Lelaki-lelaki tersebut ditangkap dan ditahan dan pihak

polis menggeledah premis tersebut dan mendapati terdapat 15,821g methamphetamine. Pelbagai jenis peralatan pembuatan/pemprosesan dan bahan kimia juga didapati di premis tersebut. Setelah mendapati bahawa unsur pemilikan telah dibuktikan terhadap ketiga-tiga lelaki tersebut, hakim perbicaraan mengguna pakai anggapan pengedaran terhadap mereka di bawah s 37(da) dan kemudian meminta mereka membela diri setelah memutuskan bahawa kes prima facie telah dibuktikan. Mahmood mendakwa beliau tidak ada kaitan dengan rumah atau dadah tersebut dan bahawa beliau baru tiba di rumah tersebut untuk menghantar makanan dari sebuah restoran tempat beliau bekerja ketika polis menangkapnya. Reza dan Hassan, sebaliknya, mengatakan mereka hanya mengikuti seorang Mehdi di dalam keretanya ke rumah dan tertidur ketika mereka tiba-tiba terjaga oleh pihak polis yang melakukan serbua. Hakim perbicaraan mendapati pembelaan ketiga-tiganya adalah penafian kosong semata-mata dan mensabitkan mereka setelah mendapati mereka tidak membantah anggapan pengedaran atau menimbulkan keraguan yang munasabah terhadap kes pendakwaan.

Dalam rayuan semasa, Abdullah, Reza dan Hassan membangkitkan persoalan undang-undang yang sama, yakni, bahawa kes prima facie pengedaran tidak dapat dibuktikan hanya dengan mengguna pakai anggapan pengedaran di bawah s 37(da) ADB. Mereka berpendapat bahawa anggapan undang-undang bukanlah suatu keterangan dan bahawa s 180(4) Kanun Tatacara Jenayah ('KTJ') memperuntukkan bahawa dalam menentukan sama ada kes prima facie telah dibuktikan terhadap tertuduh pada akhir kes pendakwaan, pihak pendakwaan haruslah 'mengemukakan bukti yang boleh dipercayai yang membuktikan setiap unsur kesalahan yang jika tidak dibantah atau tidak dapat dijelaskan akan menyebabkan sabitan'. Pihak pendakwaan menjawab bahawa, antara lain, s 180(4) KTJ adalah pemakaian undang-undang umum dengan tujuan untuk mengetahui sama ada kes prima facie telah dibuktikan, oleh kerana ADB adalah undang-undang khusus untuk menangani kesalahan dadah berbahaya, anggapan di bawah s 37(da) ADB adalah bukti yang dipercayai untuk membuktikan kes pengedaran.

Diputuskan, dengan sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Rayuan ('MR'):

(1) Dengan menyusuri sejarah perundangannya, jelas bahawa keseluruhan tujuan s 180(4) KTJ adalah untuk menjelaskan niat Parlimen agar siling batasan diterapkan pada akhir kes pendakwaan. Tujuan s 180(4) bukanlah untuk mengecualikan penggunaan anggapan tersebut, kesimpulan atau apa pun selain bukti secara langsung, dalam membuktikan kes prima facie. Anggapan undang-undang sering digunapkai oleh pihak pendakwaan untuk membuktikan kes prima facie pengedaran dadah dalam kes sebelumnya. Tidak ada kebimbangan yang dibangkitkan di Parlimen mengenai penggunaan anggapan ketika

pindaan terhadap s 180 dari KTJ sedang dipertimbangkan (lihat perenggan 41–42).

(2) Dengan membaca s 180(4) KTJ berdasarkan konteks dan tujuan perundangannya, frasa 'bukti yang dapat dipercayai yang membuktikan setiap unsur kesalahan' bermaksud bahawa pihak pendakwaan dapat membuktikan setiap unsur kesalahan tersebut: (a) dengan mengemukakan bukti langsung yang boleh dipercayai terhadap unsur tersebut; (b) dengan membuat kesimpulan fakta, iaitu dengan mengemukakan bukti keadaan yang boleh dipercayai, dari mana unsur tersebut dapat disimpulkan; atau (c) dengan mengguna pakai anggapan undang-undang, iaitu dengan mengemukakan bukti yang boleh dipercayai mengenai fakta asas yang relevan, untuk menggunakan anggapan undang-undang bahawa unsur tersebut wujud. Oleh itu, untuk bergantung pada anggapan pengedaran dalam s 37(da) ADB, pihak pendakwaan harus mengemukakan bukti yang boleh dipercayai mengenai fakta-fakta asas, iaitu, sifat dan jumlah bahan terlarang yang dimaksudkan dan unsur pemilikan (lihat perenggan 43 & 47).

(3) Seksyen 37(da) ADB wujud sebelum s 180(4) KTJ. Apabila s 180(4) diperkenalkan ke dalam KTJ, Parlimen pasti telah mengetahui undang-undang yang sedia ada dan cara dan kaedah khusus di mana kes-kes pengedaran dibuktikan, aitu, berdasarkan anggapan berdasarkan dapatan fakta pemilikan. Sekiranya Parlimen bermaksud untuk kesan drastik dengan secara efektif meminda peruntukan undang-undang yang telah lama wujud, ia akan mengatakannya dengan jelas. Selanjutnya, ADB secara khusus menangani perbicaraan dadah berbahaya. KTJ, sebaliknya, adalah undang-undang penerapan umum. Konflik antara undang-undang tertentu dan undang-undang umum dapat diselesaikan dengan penerapan maxim *generalia specialibus derogant* atau dengan doktrin harmonious construction (lihat perenggan 52–53).

(4) Seksyen 180(4) KTJ harus dibaca secara harmoni dengan s 37(da) ADB. Konstruksi sedemikian akan mengehadkan 'bukti yang boleh dipercayai' pada dapatan sebenar pemilikan dan setelah ianya berjaya dibuat, akan mengguna pakai anggapan pengedaran dadah. Pembelaan kemudian akan dipanggil pada pengedaran di mana beban undang-undang akan beralih kepada tertuduh untuk menyangkal pengedaran (lihat perenggan 58)

(5) Pada konstruksi yang wajar, untuk membuktikan kes prima facie berdasarkan s 180(4) KTJ, bukti yang dapat dipercayai masih diperlukan untuk penemuan prima facie mengenai pemilikan sebenar. Pada masa itulah anggapan pengedaran akan diguna pakai bagi tertuduh untuk menyangkal imbangan kebarangkalian bahawa beliau tidak mengedar dadah berbahaya. Sebarang konstruksi lain akan bertentangan dengan preseden kehakiman dan juga akan menjadikan keseluruhan rejim

anggapan tersebut berlebihan, tanpa sebarang utiliti dan secara efektif terjumlah pemansuhan s 37(da) ADB (lihat perenggan 60).

(6) Dalam rayuan semasa, setelah menemukan bahawa milikan sebenar atau tetap terhadap dadah yang oleh tertuduh telah ditentukan berdasarkan bukti yang dapat dipercayai dan bahawa berat dadah tersebut melebihi batasan undang-undang, hakim perbicaraan berhak untuk membuat dapatan bahawa kes prima facie telah dibuktikan berdasarkan s 180(4) KTJ dengan mengguna pakai anggapan pengedaran di bawah s 37(da) ADB (lihat perenggan 61).

(7) Tidak ada alasan untuk tidak bersetuju dengan penegasan MR mengenai dapatan hakim perbicaraan berkenaan dengan pembelaan Reza dan Hassan. Kedua-dua mereka mendakwa mereka minum dengan seorang Mehdi di sebuah kelab selepas itu mereka mengikuti Mehdi dengan kereta Mercedes Benz ke rumah di mana dadah tersebut dijumpai dan selepas itu mereka terus minum sehingga tertidur. Hakim perbicaraan mendapati versi ini mustahil kerana, antara lain, Mehdi tidak diberitahu segera kepada polis, namanya hanya dibangkitkan semasa perbicaraan, pasukan polis yang memerhati rumah tersebut tidak melihat kereta Mercedes Benz dan tidak ada orang bernama Mehdi di rumah ketika polis membuat serbuan. MR menganggap kenyataan bahawa Reza dan Hassan tidak menjelaskan mengapa mereka satu-satunya di rumah tersebut dan mengapa mereka melarikan diri ketika polis datang. Semasa penangkapan, Reza dan Hassan adalah satu-satunya yang mengawal premis tersebut. Melihat keseluruhan bukti, sangat mustahil kehadiran mereka secara kebetulan. Sekiranya Mehdi adalah pelakunya dan penyebab kesulitan mereka, mereka seharusnya memberitahu polis mengenai Mehdi segera setelah penangkapan mereka dan tidak menunggu sehingga perbicaraan. Versi yang dikemukakan oleh Reza dan Hassan tidak menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Berdasarkan bukti tersebut, tidak ada kekhilafan dalam dapatan bahawa Reza dan Hassan memiliki jagaan, kawalan dan pengetahuan mengenai dadah tersebut dan seterusnya memilikinya. Sabitan dikekalkan (lihat perenggan 63–66 & 68–69).

(8) MR benar dalam membatalkan sabitan Mahmood pada dapatan bahawa unsur pemilikan tidak dibuktikan terhadapnya. Antara lain, MR mendapati bahawa tidak ada bukti untuk membuktikan bahawa Mahmood telah memasuki rumah pada bila-bila masa dalam tempoh pengawasan; bahawa tidak ada saksi yang memberi keterangan bahawa Mahmood dilihat berada di dalam kereta yang datang ke rumah tersebut; bahawa Mahmood hanya berada di rumah itu selama lapan minit sebelum beliau ditangkap dan ini tidak mencukupi untuk membuktikan bahawa beliau mempunyai jagaan dan kawalan terhadap dadah terbabit; bahawa tidak ada DNA atau cap jari Mahmood yang ditemui di

mana-mana barang di rumah tersebut; bahawa beliau memakai pakaian yang tidak sesuai dengan keterangan yang diberikan oleh SP8 terhadap orang yang dilihatnya cuba melarikan diri melalui bumbung rumah; bahawa tidak seperti Reza dan Hassan yang mengalami kecederaan ketika mereka melompat dari bumbung, tidak ada kecederaan pada Mahmood dan kenyataan Mahmood kepada polis bahawa beliau bekerja di Restoran & Kelab 1001 Nights dan telah pergi ke rumah untuk menghantar makanan ketika beliau ditangkap selari dengan pembelaannya semasa perbicaraan (lihat perenggan 70–74).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1, FC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Haw Tua Tau v PP; Tan Ah Tee v PP; Low Hong Eng v PP [1981] 2 MLJ 49, PC (refd)
In the matter of application No 578 of 1940 to the Rent Assessment Board; ex parte Tan Swee Eng [1941] 1 MLJ 191 (refd)
Jazlie bin Jaafar v PP [2020] 1 MLJ 417; [2020] 2 CLJ 28, FC (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (folld)
PP v Chin Yoke [1940] 1 MLJ 47 (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (folld)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141, FC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Soo Sing & Two Ors v PP [1951] 1 MLJ 143, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514, FC (refd)
The PP, Johore v Fong Ah Tong and Cheong Chi Shen [1940] 1 MLJ 240 (refd)
Webb v Outrim [1907] AC 81, PC (refd)

Legislation referred to

Criminal Procedure Code s 180, 180(1), (4)
Dangerous Drugs Act 1952 ss 37, 37(a), (b), (c), (d), (da), (e), (f), (g), (h), (i), (j) 39B, 39B(1)(a)
Evidence Act 1950 s 27

Teh Poh Teik (Sukhaimi bin Mashud with him) (Teh Poh Teik & Co) in Criminal

Appeal Nos 05(M)-56–02 of 2019(J) and 05(M)-205–09 of 2018(W) for the appellant.

Kitson Foong (Chew Jee San with him) (Kit & Assoc) in Criminal Appeal No 05(M)-206–09 of 2018(W) for the appellant.

How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No 05(LB)-207–09 of 2018(W) for the appellant.

Mohd Dusuki bin Mokhtar (Asmah bt Musa with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal Nos 05(M)-56–02 of 2019(J) and 05(M)-205–09 of 2018(W) for the respondent.

Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No 05(M)-206–09 of 2018(W) for the respondent.

Kamarul Hisham (Syafiqah bt Sofian with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) in Criminal Appeal No 05(LB)-207–09 of 2018(W) for the respondent.

Tengku Maimun Chief Justice:

INTRODUCTION

[1] The following four appeals:

(a) 05(M)-56–02 of 2019(J) between Abdullah bin Atan ('Abdullah') v Public Prosecutor;

(b) 05(M)-205–09 of 2018(W) between Mohamad Reza Ghaem Panah Nezamali ('Reza') v Public Prosecutor;

(c) 05(M)-206–09 of 2018(W) between Hasan Javadipirouz Avazali ('Hasan') v Public Prosecutor; and

(d) 05(LB)-207–09 of 2018(W) between Public Prosecutor v Mahmood Yary Mohammad ('Mahmood'),

were heard together as they raised a common point of law, ie whether, in the trial of a charge for drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the DDA'), the presumption of trafficking in s 37(da) of the DDA constitutes credible evidence for the prosecution to make out a prima facie case under s 180(4) of the Criminal Procedure Code ('the CPC').

[2] Abdullah was convicted by the High Court at Johor Bahru while Mahmood, Reza and Hasan were convicted by the High Court at Kuala Lumpur, for the offence of trafficking in dangerous drugs. They were sentenced to death under s 39B of the DDA.

[3] Aggrieved by the decision of the High Court, they appealed to the Court of Appeal. The Court of Appeal dismissed the appeals by Abdullah, Reza and Hasan but allowed the appeal by Mahmood. Hence the appeals before us

by Abdullah, Reza and Hasan against the decision of the Court of Appeal affirming their convictions and sentence, and by the public prosecutor against the acquittal and discharge of Mahmood.

BACKGROUND FACTS

Appeal No 56 (Abdullah's case)

[4] The charge against Abdullah reads:

> Bahawa kamu pada 15/5/2016 jam lebih kurang 04.45 petang, di bilik sewa Nombor 16-01, Jalan Permas 4/4, Bandar Baru Permas Jaya, dalam Daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya jenis Cannabis seberat bersih 4,213 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[5] Briefly, the narrative of the prosecution's case is as follows. On 15 May 2016, Insp Mohd Nasaruddin bin Adnan ('SP4') and his team were on duty at the Permas Jaya area, where SP4 saw Abdullah standing by the road side. After observing Abdullah for about 15 minutes, SP4 approached Abdullah. SP4 introduced himself as a police officer. Abdullah immediately took flight. SP4 gave chase and Abdullah was apprehended.

[6] A body search was conducted on Abdullah. Nothing incriminating was found. Abdullah had a set of keys which were seized by SP4.

[7] It was the prosecution's case that upon interrogation, Abdullah disclosed information that led to the discovery of the impugned drugs at No 16-01, Jalan Permas 4/4, Permas Jaya, Johor Bahru ('the premises'), a double storey shop house. SP4 and his men gained entry to the premises using one of the keys seized from Abdullah. According to SP4, upon further questioning, Abdullah pointed to a room. The room was locked and using another key from the set seized earlier, SP4 unlocked the door. Upon gaining access, SP4 asked Abdullah where he kept the drugs. Using his right foot, Abdullah indicated that the drugs were under a table in the room.

[8] SP4 recovered an orange plastic bag wherein there were five compressed slabs. On analysis by the chemist, the drugs were confirmed to be cannabis, the subject matter of the charge.

[9] The learned trial judge found that the prosecution had made out a prima facie case against Abdullah. Pursuant to s 27 of the Evidence Act 1950, the learned judge admitted the information given by Abdullah, upon which the drugs were found. His Lordship found that the statement under s 27 'enabled

knowledge of the existence and the whereabouts of the drugs and its nature to be attributed to the accused. As the accused had such knowledge, the mental element required to establish possession was therefore present'. A

[10] Having found that Abdullah had actual possession of the impugned drugs, and given the weight of the drugs which exceeded the statutory minimum amount, His Lordship invoked the presumption under s 37(da) of the DDA to hold that the prosecution had also proven the element of trafficking. In the circumstances, Abdullah was ordered to enter on his defence. B

[11] Abdullah's defence was essentially that he had no knowledge of the drugs. He testified that the drugs belonged to one Annie who stayed in the same room with him. C

[12] In evaluating the defence, the learned trial judge made, inter alia, a finding of fact that there was no personal documentation of any kind in the name of Annie found in the room. Neither was there any item to indicate the presence of a female. D

[13] The learned trial judge concluded that the existence of Annie was concocted by Abdullah to exculpate himself. His Lordship found that Abdullah failed to rebut on a balance of probabilities the statutory presumption under s 37(da) of the DDA and had failed to raise a reasonable doubt on the prosecution's case. Abdullah was thus convicted and sentenced to death. E

[14] In the Court of Appeal, two grounds were advanced to support Abdullah's appeal ie that the learned trial judge erred in admitting the statement under s 27 of the Evidence Act 1950 and that the learned judge erred in failing to give due consideration to the fact that Annie had access to the room and the impugned drugs. F

[15] The above grounds found no favour with the Court of Appeal. Abdullah's appeal was thus dismissed and the sentence and conviction affirmed. G

Appeals Nos 205, 206 and 207 (Reza, Hasan and Mahmood's cases) H

[16] Mahmood, Reza and Hasan, all Iranian nationals were jointly charged as the first, second and the third accused respectively, for an offence under s 39B(1)(a) of the DDA. The charge against them reads: I

> Bahawa kamu bersama-sama pada 11/2/2012 jam lebih kurang 5.00 petang di seunit rumah No. 9, Jalan Dutamas Melor 1, Changkat Kiara Bayu Off Jalan

Dutamas, dalam Daerah Sentul, dalam Bandaraya Kuala Lumpur, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 15,821 gram. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 38B(2) Akta yang sama serta dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[17] The prosecution's case against them may be summarised thus. The police had conducted surveillance on No 9 Jalan Dutamas Melor 1, Changkat Bukit Kiara Bayu ('the house') beginning from 6 February 2012 where movements by individuals as well as vehicles going in and out of the house were monitored. This was done from the adjacent Prima Duta Condo's water reservoir tank located within 500 meters from the said house, by using binoculars. For the purpose of recording movements of a white Proton Persona car with registration number WWB 1217 ('the car'), surveillance was also conducted at the gate of the guard post.

[18] On 11 February 2012 at about 4.50pm, the car was seen entering the gate and it stopped at the said house. One man was seen exiting the car and another was seen coming out from the house. Both were then seen entering the house. The police moved in. They broke the front door of the house. ASP Didi Fairuz bin Zainal Abidin ('SP8') immediately headed to the top floor of the house. He saw three men fleeing the house through the roof. One was described as wearing a white shirt and a long jeans while the other two were described as wearing shorts and, shirtless.

[19] From the prosecution's narrative, the three men fleeing the house were the accused persons who were then arrested and brought to the house. In the house, police discovered boxes of drugs containing 15,821g of methamphetamine alongside other evidence, which essentially established the fact that the house was used to manufacture drugs.

[20] The trial judge made positive findings that the three accused were in possession of the drugs and given the weight of the drugs, His Lordship invoked the presumption of trafficking under s 37(da) of the DDA, to find that a prima facie case of trafficking had been established against the three accused. The three accused were thus ordered to enter their defence.

[21] In gist, Mahmood's defence was based on identification: it was contended that at the time of the arrest, he was not wearing a white shirt as asserted by the prosecution, but a blue floral shirt. Mahmood's version was that he was working at 1001 Nights Restaurant & Club as a delivery man and that he was at the house to deliver food. He denied fleeing the house through the roof.

[22] Reza and Hasan both relied on the same principal defence that they had no knowledge of the drugs. They contended that they only went to the house upon invitation of one Mehdi and that they had been spending time drinking until the time of the arrest.

[23] The learned trial judge found that the defences were bare denials and that all the accused had failed to rebut the presumption of trafficking on a balance of probabilities and had failed to raise a reasonable doubt on the prosecution's case. They were accordingly convicted and sentenced to death.

[24] On appeal, the Court of Appeal quashed Mahmood's conviction. The Court of Appeal found that the learned trial judge erred in law and fact in finding that Mahmood had custody and control of the impugned drugs. The conviction of Mahmood was found to be wholly unsafe, as there was no evidence to show that Mahmood resided at the house and that he was at the house during the whole operation. The Court of Appeal found that on the day the raid took place, Mahmood had been at the house for eight minutes and this was held to be insufficient to establish custody and control of the impugned drugs on his part.

[25] As regards Reza and Hasan, the Court of Appeal found that the learned trial judge did not err when he found both Reza and Hasan to be in possession of the impugned drugs. From the direct evidence adduced by the prosecution which included the scientific evidence of DNA profile and finger prints of Reza and Hasan which placed them on the fourth floor of the house where the drugs were found, the Court of Appeal opined that it was fair to infer that they must have knowledge of the drugs when they fled from the house to evade arrest.

PROCEEDINGS IN THE FEDERAL COURT

[26] Before us, Abdullah, Reza and Hasan raised a common point of law, ie that the trial judge erred in invoking the presumption of trafficking under s 37(da) of the DDA to hold that the prosecution had established a prima facie case.

[27] In essence, the arguments on this point of law are as follows:

(a) s 180(4) of the CPC required the prosecution to prove each ingredient of the offence by 'credible evidence';

(b) a prima facie case can only be found on 'credible evidence'. A statutory presumption does not amount to evidence;

(c) no 'credible evidence' had been adduced to prove the ingredient of trafficking;

(d) as such, the trial judge was not entitled to find that a prima facie case of trafficking had been made out; and

(e) reliance on the presumption under s 37(da) of the DDA is in breach of s 180(4) of the CPC.

[28] In response, the prosecution submitted that:

(a) the presumption of trafficking under s 37(da) of the DDA was introduced by Parliament to strengthen the law pertaining to drug offences and to assist law enforcers. The court should consider the intention of the Parliament in interpreting s 37(da) of the DDA;

(b) laws enacted by the Legislature are presumed to be constitutional. The court cannot give a legislative provision a different meaning than what was intended by Legislature to avoid encroaching into the powers of the Legislature;

(c) the presumption of trafficking under s 37(da) of the DDA is a rebuttable presumption, and therefore does not deny the accused the right to a fair trial;

(d) the presumption of trafficking is a common practice in other jurisdictions that advocate fundamental rights and equality;

(e) s 180(4) of the CPC is a law of general application for prosecution to establish sufficient evidence for prima facie case. The DDA is a specific law. Any conflict between the provisions in the two laws may typically be resolved by the maxim *generalia specialibus non derogant;* and

(f) the presumption of trafficking under s 37(da) of the DDA is credible evidence.

[29] Insofar as Reza and Hasan were concerned, they had also raised issues of fact in contending that the courts below erred in their findings on the ingredient of possession for the following reasons:

(a) that they had no custody and control of the drugs for the reasons that they were merely guests at the house;

(b) that they were not the owners or tenants of the house;

(c) that there was possibility of access by others;

(d) that their fingerprints were not found on the impugned drugs;

(e) that undue emphasis was placed on the conduct of running away; and

(f) that the surveillance team and the raiding team were unable to confirm the identity of the men seen coming in and out of the house and the men fleeing the scene during the raid.

[30] Reza and Hasan had further contended that their defence had not been adequately, fairly and sufficiently considered by the learned trial judge and the Court of Appeal, and that this non-direction amounted to a misdirection prejudicial to their conviction.

[31] On the prosecution's appeal, learned DPP essentially argued that the Court of Appeal erred in acquitting Mahmood as:

(a) the presence of Mahmood for eight minutes in the house, taken together with the earlier surveillance, the escape and the arrest together with Reza and Hasan show that Mahmood had custody and control and knowledge of the impugned drugs;

(b) the arrest of Mahmood was not accidental;

(c) the surveillance on the car seen driven by a male, entering the house and staying for prolonged hours just five days prior to the arrest show knowledge and possession of the impugned drugs by Mahmood; and

(d) it may be inferred from the presence of Mahmood together with Reza and Hasan before the raid and the immediate fleeing from the said house that there was a prior meeting of minds for the purpose of trafficking in the impugned drugs.

OUR DECISION

Issue of law

[32] The point of law raised in these appeals concerns the interpretation of sub-ss (1) and (4) of s 180 of the CPC which read:

> 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> ...
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[33] Section 180(4) in its present form was introduced vide s 22 of the Criminal Procedure Code (Amendment) Act 2006 (Act A1274). The original version of s 180 reads:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

[34] Act A1274 was enacted to provide for the standard of proof at the end of the prosecution case. Prior to the Privy Council decision in *Haw Tua Tau v Public Prosecutor; Tan Ah Tee v Public Prosecutor; Low Hong Eng v Public Prosecutor* [1981] 2 MLJ 49, the consistent judicial opinion was that at the close of the prosecution case, the burden on the prosecution was to adduce evidence to prove their case beyond all reasonable doubt. The judge must not necessarily accept all the prosecution evidence at face value, but must weigh the evidence to decide whether it is safe to convict upon such evidence standing alone (see *Public Prosecutor v Chin Yoke* [1940] 1 MLJ 47; *The Public Prosecutor, Johore v Fong Ah Tong and Cheong Chi Shen* [1940] 1 MLJ 240; *Soo Sing & Two Ors v Public Prosecutor* [1951] 1 MLJ 143).

[35] The legal position was altered by the Privy Council decision in *Haw Tua Tau*, an appeal from the Singapore Court of Criminal Appeal. In interpreting the Singapore equivalent of s 180 of the CPC, Lord Diplock held that:

(a) the section only required the prosecution to make out a case against the accused by adducing some evidence of primary facts;

(b) the test at the close of the prosecution's case is a pure hypothetical question of law, ie whether there is some evidence (not inherently incredible) which, if the court were to accept as accurate, would establish each essential element of the offence. It is not a question of fact as to whether the prosecution has already establish a case beyond reasonable doubt against the accused;

(c) at the close of the prosecution's case, the court must act on the presumptions that:

(d) all evidence of primary facts is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and

(e) there will be nothing to displace inferences as to further facts which would reasonably be drawn from the primary facts, in the absence of any further explanation.

[36] The decision of the Privy Council suggests that at the close of the prosecution's case, the court is only required to undertake a minimal evaluation of the evidence. When the court finds that the prosecution has made out a prima facie case, it merely means that the facts are not inherently incredible and there is some evidence that goes to each essential element of the offence (see *Mallal's Criminal Procedure* (6th Ed, Kuala Lumpur: MLJ, 2001) at I3161).

[37] *Haw Tua Tau* led to a series of conflicting decisions. In *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 and *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, our apex court expressly departed from *Haw Tua Tau*. It was held that at the close of the prosecution's

case, the court must undertake a maximum evaluation of the prosecution evidence to determine whether the prosecution has established the charge against the accused beyond all reasonable doubt.

The 1997 amendment

[38] In order to re-establish the prima facie test, in 1997, Parliament vide Act A979, amended s 180 of the CPC. The amended s 180 of the CPC reads:

> 180 (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[39] The purpose of the amendment was to reinstate the law as stated in *Haw Tua Tau,* and to thereby depart from *Khoo Hi Chiang* and *Arulpragasan*. The amendment was to clarify that the standard of proof at the close of the prosecution's case is prima facie and not beyond reasonable doubt (see *Hansard, House of Representatives*, Second Reading of Criminal Procedure Code (Amendment) Bill 1996 on 18 December 1996 at pp 13–16 and 47–48).

[40] The amendment however did not lead to a return to *Haw Tua Tau*. Subsequent to the amendment, in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the courts in interpreting the amended s 180 CPC, have held that:

(a) to establish a prima facie case, the prosecution must adduce evidence beyond reasonable doubt, such that the evidence must be sufficient to convict the accused if he remains silent; and

(b) the court must undertake a maximum evaluation of the prosecution evidence, including carefully scrutinising the credibility of the prosecution witnesses.

The 2006 amendment

[41] It was against the background of these decisions that s 180 of the CPC was again amended by Parliament in 2006 *vide* Act A1274 to insert sub-s (4) in the present terms (see *Hansard, House of Representatives*, Second Reading of Criminal Procedure Code (Amendment) Bill 2004 on 13 July 2006 at p 32). By tracing its legislative history, it is apparent that the whole purpose of s 180(4) of the CPC was to clarify Parliament's intention for the threshold to be

applied at the close of the prosecution's case.

[42] The purpose of s 180(4) of the CPC was thus not to exclude the use of presumptions, inferences, or anything other than direct evidence, to establish a prima facie case. On the contrary:

(a) the Privy Council in *Haw Tua Tau* itself expressly envisaged that inferences may be drawn from the primary facts adduced, and the court must presume such inferences to be true at the close of the prosecution's case; and

(b) statutory presumptions have often been invoked by the prosecution in order to establish a prima facie case of drug trafficking in previous cases. No concern was raised in Parliament as to the use of presumptions when considering amendments to s 180 of the CPC (see: *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514).

[43] Section 180(4) of the CPC must be read in light of its context and legislative purpose. By so doing, the phrase 'credible evidence proving each ingredient of the offence' in s 180(4) means that the prosecution may prove each ingredient of the offence either:

(a) by adducing credible direct evidence of that ingredient;

(b) by drawing inferences of fact, ie adducing credible circumstantial evidence, from which the ingredient can be inferred; or

(c) by invoking presumptions of law, ie adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.

[44] As to what constitutes 'a prima facie' case, the judgment of Vincent Ng J (as he then was) in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 is instructive. Although *Ong Cheng Heong* was decided prior to the amendment in 2006, we respectfully endorse His Lordship's views, at p 691 (MLJ); p 225 (CLJ):

> What then constitutes a 'prima facie case'? 'Prima facie' means on the face of it or at first glance. ... perhaps the most appropriate definition of 'a prima facie case' could be found in the *Oxford Companion of Law* (p 987), which has it as: 'A case which is sufficient for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, *but is not conclusive*'. It would follow that there should be credible evidence on each and every ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected. (Emphasis added.)

At p 691 (MLJ); p 224 (CLJ), His Lordship said:

> ... to me, maximum evaluation simply means evaluation, on a prima facie basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led, rather than the persuasive burden in terms of qualitative degree of proof.

[45] The only basis of learned counsel's contention that the presumption in s 37(da) cannot be invoked to establish a prima facie case under s 180 of the CPC, is that presumption is not evidence. Hence, it was argued that in relying on such presumption, it cannot be said that the prosecution has 'adduced credible evidence proving each ingredient of the offence' under s 180(4) of the CPC. The argument is premised purely on semantics.

[46] Indeed, a presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved, as supported by the following authorities:

> A presumption has no probative value and is not evidence, being nothing more than a rule of law which assists a party in making out a prima facie case' (see Michigan Law Review, 'Presumptions as Evidence in Criminal Cases' at 504);
>
> Presumptions are a special mode of proving facts which must otherwise be proved by evidence. Where there is direct evidence to prove the presumed facts, the presumptions do not need to be applied (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 at 668).

[47] Presumptions of fact and law operate in every legal system. The use of presumptions has always been standard judicial practice. This court has endorsed the use of the presumption in s 37(da) of the DDA by the prosecution to establish a prima facie case of drug trafficking. What is required of the prosecution is to adduce credible evidence of the basic facts (ie the nature and amount of the drug and, possession), in order to rely on the presumption of trafficking in s 37(da).

[48] In *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, the issue was whether at the close of the prosecution's case, the court, in a trafficking case, could make a finding of 'custody and control' to presume possession and then on that presumption, further presume trafficking. This court held that the use of presumption over presumption was unduly harsh and oppressive. Nevertheless, it was unanimously recognised that the presumption of trafficking may be invoked only once a finding of actual possession is made. Chong Siew Fai CJSS said the following at pp 288–289, 292:

> The wordings in sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so,

A their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. ...

In our view, there is clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of
B law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody and control. Such presumptions as under s 37(d) (and for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our
C present case, proof of custody or control in s 37(d) by the prosecution), the court *must* in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

D ...

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal
E presumption) of possession as understood in criminal law, based on evidence.

...

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the
F dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

G **[49]** Applying the above passage in *Muhammed bin Hassan*, 'based on evidence' therefore refers to the finding of possession and not the finding of trafficking (see also *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685).

H **[50]** Another case on point is *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, where the accused was charged with corruption before the sessions court but was acquitted at the end of the trial. The question before the Privy Council was whether the legal burden shifted to the accused, and if it did, what was the requisite standard of proof. The relevant statute in that case also contained a
I presumption of corrupt intent. Lord Diplock observed as follows, at p 92, in respect of how presumptions operate as regards the ingredients of an offence:

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But

> exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a (sic) fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.
>
> ... in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been 'proved' or 'not proved' by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the existence of the first two factual ingredients of the offence, viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift, or receipt he was in the employment of a public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies with the prosecution. In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist 'unless the contrary is proved.

[51] In *In the matter of application No 578 of 1940 to the Rent Assessment Board; ex parte Tan Swee Eng* [1941] 1 MLJ 191, Terrell, Ag CJ (FMS) at p 192 adopted and applied the rule of construction in *Webb v Outrim* [1907] AC 81:

> When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later Statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to be the meaning which has been so put upon them.

[52] The presumptions in s 37(a)–(j) of the DDA have been in place since the promulgation of the Dangerous Drugs Ordinance 1952. The presumption of trafficking in s 37(da) of the DDA was inserted in 1997. These statutory presumptions long pre-date the insertion of s 180(4) of the CPC in 2006. Therefore, when s 180(4) of the CPC was introduced, Parliament is presumed to be aware of the existing law and of the specific manner and method in which trafficking cases are proved ie on a presumption basis upon a finding of fact of possession. Had Parliament intended the drastic consequence of effectively

repealing a long-established statutory provision, one would expect Parliament to have said so in clear terms (see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 at para [33]).

[53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is via the maxim *generalia specialibus derogant*. The second is the doctrine of harmonious construction.

[54] The former Federal Court had the occasion to consider the operation of the CPC and the DDA in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119. In *Chew Siew Luan*, the question was whether the provisions relating to bail in the CPC were applicable to a trafficking charge preferred under the DDA. The Federal Court unanimously held that the provisions of the DDA will apply to the exclusion of the CPC. This is what Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:

> Now, the Criminal Procedure Code (FMS Cap 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act, 1967.
>
> The Dangerous Drugs Act 1952 (Revised — 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (A A426) and became operative on 10.3.1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law ...
>
> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. ... The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the

> specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of section 41B(1)(c) of the Dangerous Drugs Act ...

[55] The above observation by the then CJ (Malaya) fits squarely into the present appeals. In that regard, the opening words of s 37 of the DDA are important. They provide: 'In all proceedings under this Act or any regulation made thereunder ...' and the section then sets out specific presumptions, in this case, of trafficking under s 37(da). For convenience, the relevant portion of s 37(da) of the DDA on presumption of trafficking is reproduced below:

> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (da) any person who is found in possession of —
>
> ...
>
> (vi) 200 grammes or more in weight of cannabis;
>
> ...
>
> (xvi) 50 grammes or more in weight of Methamphetamine; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[56] The fundamental rule in criminal law is that the prosecution must prove every element of the offence charged beyond reasonable doubt, and that the accused bears no onus of proof. This general rule is however subject to exceptions as there is a limit to what the prosecution can reasonably be expected to prove. The English common law authorities codified in our written law affirmatively recognise that it is lawful in certain cases to shift the onus to the accused to exculpate himself in certain situations. These situations include defences which relate to facts especially within the knowledge of the accused including the proof of lawful authority; or where a statutory presumption provides that a particular fact is presumed to exist unless the contrary is proved (see *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 and *Jazlie bin Jaafar v Public Prosecutor* [2020] 1 MLJ 417; [2020] 2 CLJ 28).

[57] The role of presumptions in the wider context of the criminal legal system may be simplified thus: where a statutory presumption is invoked to presume the existence of certain fact as being the ingredient of the offence, the onus then shifts to the accused to disprove the presumed fact on the balance of probabilities and to thereby exculpate himself from the charge. If he does so, he earns an acquittal. If he does not, he is guilty of the charge.

[58] Section 180(4) of the CPC and s 37(da) of the DDA must be read

harmoniously, applying the doctrine of harmonious construction. In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result and that construction should favour coherence in the law (see *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141 at paras 78–79). A harmonious construction would limit 'credible evidence' to the actual finding of possession, as propounded in *Muhammed bin Hassan*, and once that is established successfully, it would invoke the presumption of trafficking. Defence will then be called on trafficking where the legal burden would shift to the accused to disprove trafficking.

[59] Reverting to learned counsel's interpretation of the two sections respectively of the CPC and the DDA and his argument that reliance on the presumption under s 37(da) of the DDA is in breach of s 180(4) of the CPC, those arguments if acceded to, would render s 37(da) superfluous or in the words of this court in *Chew Siew Luan*, 'would result in nullifying the purport and effect' of the provisions of s 37(da) of the DDA. Further, to sustain learned counsel's argument that the learned trial judge was not entitled to find a prima facie case of trafficking by invoking the presumption of trafficking under s 37(da), would render s 37(da) otiose. Learned counsel for Abdullah indeed conceded during oral argument that his submission was in effect an attempt to convince us to do away with the presumptions regime of the DDA.

[60] On a proper construction, to make out a prima facie case under s 180(4) of the CPC, credible evidence is still required for a prima facie finding of actual possession. It is then that the presumption of trafficking kicks in for the accused to disprove on a balance of probabilities that he did not traffic in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent. It would also render the entire presumption regime superfluous, devoid of any utility and would effectively amount to a repeal of s 37(da) of the DDA.

[61] To conclude on this issue, it is our unanimous view that having found that actual or affirmative possession of the impugned drugs by the accused had been established based on credible evidence and the weight of the drugs in question exceeded the statutory limit, the learned trial judges were entitled to find that a prima facie case had been made out under s 180(4) of the CPC, by invoking the presumption of trafficking under s 37(da) of the DDA. This approach is correct in law.

Issues of fact

[62] We now move to the issues of fact raised by Reza and Hasan, where they challenge the prosecution's version of their arrest. It was contended that

knowledge and possession of the drugs stated in the charge had not been proven against them and that the learned trial judge had failed to adequately evaluate the defence case. For the record, learned counsel for Abdullah confined his oral and written submission on the issue of law as discussed above and did not pursue any challenge on the facts. For the record too, we are satisfied with the findings of facts by the courts below.

[63] In essence, the defence of Reza and Hasan was that they had been drinking with one Mehdi at the 1001 Nights Restaurant & Club. Mehdi had invited Reza and Hasan to his house which was the same house where the drugs were found. It was their evidence that Mehdi drove both of them to the house in a Mercedes Benz car. At the house, they continued drinking from a glass beaker until they fell asleep.

[64] The learned trial judge found their version, particularly relating to Mehdi, to be improbable for the reason, inter alia, that Mehdi was not immediately informed to the police and that the name Mehdi was only brought up during trial; that there was no Mercedes Benz car seen by the surveillance team and that there was no person by the name of Mehdi found at the house when the raid took place. The Court of Appeal found no error in the learned trial judge's assessment of the evidence. It formed the view that the learned judge was entitled to come to the finding as he did.

[65] The Court of Appeal had also considered the fact that Reza and Hasan did not own the house and neither were they tenants occupying it under any tenancy agreement. The tenancy agreement was in fact found to be fictitious and that someone had gone to great lengths to hide the actual tenancy. Notwithstanding, the Court of Appeal acknowledged the fact that Reza and Hasan were the only ones found in the house. Apart from the presence of Mehdi asserted by them, no other possibility was raised as to how they came to be the only ones at the house. And since they contended that they did not flee, which was contrary to the evidence of the prosecution witnesses, no explanation was forthcoming from both of them as to why they had fled from the crime scene.

[66] We find no reason to depart from the findings of the Court of Appeal. At the time of arrest, Reza and Hasan were the only persons in control of the premises. We agree with the Court of Appeal that looking at the whole evidence, it is highly improbable that their presence was coincidental. If indeed Mehdi was the culprit and was the cause of their predicament, common sense dictates that they inform the police about Mehdi soon after their arrest, and not wait until trial. And even if Mehdi is a real character, the version as presented by Reza and Hasan could not have raised any reasonable doubt on the prosecution's case.

A **[67]** Considering all the facts and circumstances of this case, we find no error in the inference drawn by the learned trial judge that Reza and Hasan knew that the substances found in the house were illicit drugs. The discovery of various apparatus, laboratory equipment and chemical substances in the house and the testimony of the chemist on the use and functions of those apparatus, equipment and substances, lend credence to the proposition that the house was used as a clandestine drug laboratory.

[68] We agree with the Court of Appeal that the overwhelming inference is that Reza and Hasan could not have no knowledge of what was transpiring in the house given the evidence that was adduced against them. More so, when the scientific evidence placed them at the fourth floor of the house where the impugned drugs were found. Although this was not the usual type of trafficking as it involved the manufacturing of drugs, based on the evidence of the prosecution, there was no error in the finding of the courts below that the element of custody and control and knowledge had been proven and that actual possession of the impugned drugs had been established.

[69] While we accept that there was an error of fact made by the learned trial judge in respect of Hasan's clothing when he was arrested, we are of the view that such error did not vitiate the conviction of Hasan and did not occasion a miscarriage of justice. We have taken the liberty to examine the appeal records and we find that on the totality of the evidence, the convictions of both Reza and Hasan are safe.

[70] In respect of Mahmood, the Court of Appeal found that there was no evidence establishing the fact that it was Mahmood who was seen entering the house during the surveillance period and none of the witnesses testified that it was Mahmood who was seen in the car. We find no appealable error in the finding of the Court of Appeal that Mahmood had been at the house for only eight minutes when he was apprehended, and that this was insufficient to establish custody and control of the impugned drugs on his part.

[71] Significantly, despite the extensive scientific investigations at the house, no DNA or fingerprint of Mahmood was found on any items in the house. When apprehended, Mahmood had with him his passport and access card to his own apartment at another premises. When Mahmood was arrested, he was wearing clothes which did not match the description by SP8 as the someone that he saw fleeing from the house through the roof. Mahmood was wearing shoes when he was arrested and he was not injured, whereas Reza and Hasan were not wearing shoes and they were injured, which according to the prosecution's narrative, the injuries were sustained when Reza and Hasan jumped off the roof.

[72] Mahmood's version of his defence that he went to the house to deliver food was mentioned in his statement to the police. Although no investigations were carried out in this respect, there was evidence from other witnesses ie Insp Kumbat anak Tan (SP21), Amir Mohamad Ghareh (SD2) and Hamidreza Rabiei Mohamad Taghi (SD5) that Mahmood was working at 1001 Nights Restaurant & Club.

[73] The above facts and circumstances in our view support Mahmood's version. We therefore see no reason to disturb the conclusion of the Court of Appeal that the element of possession was not proven by the prosecution against Mahmood.

CONCLUSION

[74] For the reasons adumbrated above, we find that:

(a) the proposed interpretation of s 180(4) of the CPC to exclude presumptions is unsustainable as such a reading is unsupported by its legislative purpose, and leads to far-reaching consequences in criminal law;

(b) on the totality of the evidence, the convictions of Abdullah, Reza and Hasan are safe. Their appeals are unanimously dismissed and their convictions and sentence by the courts below are accordingly affirmed; and

(c) on the totality of the evidence, the conviction of Mahmood is unsafe. The prosecution's appeal is consequently dismissed and the order of acquittal and discharge by the Court of Appeal is affirmed.

Appeals dismissed; Court of Appeal decision affirmed.

Reported by Ashok Kumar